Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 03-3087, 03-3140, 03-3659 & 03-3660

WAYNE SMITH, LESCO ENTERPRISES, INC., SAN SIMON GIN, INC., GROSS-WILKINSON RANCH CO., REX DOLAN, EVERETT CHAMBERS, AND JOANNE CHAMBERS, on their behalf and all others similarly situated,

Plaintiffs-Appellees,

v.

SPRINT COMMUNICATIONS COMPANY, L.P., QWEST COMMUNICATIONS CORPORATION, LEVEL 3 COMMUNICATIONS, LLC, WILTEL COMMUNICATIONS, LLC, AND UNION PACIFIC RAILROAD COMPANY,

Defendants-Appellees.

APPEALS OF:

CHEM-TRONICS, INC., DANIEL R. BUHL, JOE C. MEIGHAN, JR., CHARLES W. HORD, AND JOY PRATT HORD,

Intervenors.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 3844-**Wayne R. Andersen, Judge**.

ARGUED JANUARY 20, 2004
DECIDED OCTOBER 19, 2004

Before CUDAHY, KANNE, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* In this case, we are asked to review a nationwide class certification, accompanied by an injunction against all competing class actions. The plaintiff class is made up of landowners whose property is subject to railroad rights of way, along which defendant telecommunications companies have installed fiber-optic cables without the landowners' permission. *See generally* Jeffery M. Heftman, Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities, 2002 U. Ill. L. Rev. 1401. We reversed certification of a virtually identical class in *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001), observing that differences in state law concerning the scope of the railroads' easements, along with differences in the various deeds themselves, would result in "a nightmare of a class action." This time, though, the class has been certified for settlement only, which the settling parties insist eliminates the complications that made the class uncertifiable in *Isaacs.* The intervening parties-who represent statewide plaintiff classes already certified in Tennessee and Kansas-argue that the class still fails to meet the certification requirements of Fed. R. Civ. P. 23(a) and (b).

Before getting to the matter at hand, we note that this case has had a troubled history. The original complaint was filed in 1999 by certain representative plaintiffs against Sprint Communications and the Union Pacific Railroad, claiming damages for the wrongful installation of fiber-optics cables across their land and seeking class-action status in the district court for the Northern District of Illinois. In 2001 the parties announced that a nationwide settlement was in the works in which all similar claims against Sprint and four other companies not yet named as defendants would be settled. Thereafter, representative class-action plaintiffs in other cases around the country got wind of the deal and intervened in order to object.

After a half a dozen hearings in Chicago, engaging the time of a district judge, a magistrate judge, and a Special Master, the settling parties, apparently not pleased with how things were going in the Windy City because the court seemed to be disinclined to approve the settlement, migrated to the United States district court in Oregon and submitted it there for preliminary approval. In doing so, plaintiff's counsel sent a letter to the judge in Chicago informing him that the settling parties would no longer seek approval of the settlement agreement in the Northern District of Illinois. After one hearing, the Oregon district judge (Judge Ann Aiken), in a decision that hit the nail squarely on its head, dismissed the case on the grounds of "judge shopping." *Zografos v. Qwest Communications Corp.,* 225 F. Supp. 2d 1217, 1223 (July 12, 2002 U.S.D.C.D. Or.). The settling parties then returned to Chicago for another stab at making their deal stick.

The fact that a settlement has been reached is, of course, relevant. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997) (citation omitted). But settlement is not a cure-all: "[The] other specifications of [Rule 23]-those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." *Id.* These include the requirement that the class representatives' claims be typical of those of the class and that the representatives will adequately protect the class's interests. Fed. R. Civ. P. 23(a)(3), (4). And not just the class as a whole: where there are significant differences among subgroups within the class, "the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *Amchem,*

521 U.S. at 627 (quoting *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 743 (2nd Cir. 1992)).

The intervening parties identify several ways in which the settling plaintiffs do not adequately represent the interests of landowners in Tennessee and in Kansas. Those two groups have already been certified as litigation classes in their respective states, and each was on the eve of trial when the district court in Chicago issued its injunction. Additionally, the Tennessee class members have established liability in state court for the taking of their property, *see Buhl v. U.S. Sprint Communications Co.*, 840 S.W.2d 904, 912 (Tenn. 1992), and estimate compensatory damages at approximately ten times greater than the upper limit provided by the proposed nationwide settlement. They have also shown that punitive damages may be available for trespass to their property, *see Meighan v. U.S. Sprint Communications* Co., 924 S.W.2d 632, 641-42 (Tenn. 1996), subject to proof at trial.

The nationwide class, in contrast, has not been and cannot be certified for trial – *see Isaacs*, 261 F.3d at 681-82. The nationwide class plaintiffs thus entered negotiations in what the *Amchem* court describes as a "disarmed" state, unable to "use the threat of litigation to press for a better offer," *Amchem*, 521 U.S. at 621-not a good position from which to represent the interests of parties that do wield such a threat.

The settling parties argue that the intervenors' interests are nevertheless protected. Specifically, the settlement agreement provided that adjustments will be made to the amount of recovery available to landowners in a given state, based on an analysis of that state's law by independent property-law experts. But although that may tend toward a more equitable division of funds, it does not provide the "structural assurance of fair and adequate representation" prior to the settlement itself that Rule 23 demands. *Amchem*, 521 U.S. at 627. Law professors are no substitute for proper class representatives. *Cf. Uhl v. Thoroughbred Tech. &*

Telecomms., Inc., 309 F.3d 978, 987 (7th Cir. 2002); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185 (2nd Cir. 1987) (disallowing the administration of class funds by independent foundation without judicial oversight).

We agree with the intervenors that they are inadequately represented by the settling plaintiffs.[1] We therefore VACATE the nationwide class certification and the district court's injunction against competing class actions and REMAND the case to the district court for further proceedings. Costs are awarded to the Intervenors.

CUDAHY, *Circuit Judge,* dissenting. It seems to me that the majority has entirely lost sight of the benefits of the federal court settlement that has been successfully negotiated here. The development involved here is the laying of a 36,000-mile network of transcontinental fiber-optic cables crossing many states to provide a national telecommunications grid. This installation of fiber-optic cables becomes part of the national communications infrastructure, having an important value for the national economy as well as for national security. Obviously, to the extent uniformity in treatment of affected landowners can be achieved, legal costs and costs of administration (ultimately charged to telecommunications users) can be reduced. The state-by-state treatment favored by the majority is likely to produce a nightmare of complexity, the inequitable treatment of landowners in different states and increased charges to telephone users everywhere. If a similar approach had been applied to the construction of the first transcontinental railroad, the Pony Express might still be galloping along.

---

[1] Our dissenting colleague, in rejecting our approach to this case, observes that if "a similar approach had been applied to the construction of the first transcontinental railroad, the Pony Express might still be galloping along." We doubt that his observation is true but also note that the Pony Express might well be still galloping along if class-action lawyers were on the prowl in the 1830's.

The principal point made by the majority opinion is that the interveners have not been adequately represented, for two reasons: A) class counsel were "disarmed" because no federal class action could be certified for litigation; and B) having law professors make adjustments to the settlement amount based on a state law is no substitute for proper class representation. Both arguments are without merit. The majority's first argument hinges on three assumptions, each of which must be true for the majority's argument to succeed. Unfortunately, each of these three assumptions is at best, unfounded and, at worst, simply incorrect.

First, based on the Supreme Court's holding in *Amchem*, the majority assumes that if class counsel are "disarmed" during the settlement negotiation process, the resulting settlement cannot or should not be approved. *Amchem*, however, does not stand for that proposition and only raises the issue of "disarmed" counsel to explain *one reason* why courts must *consider* commonality and the other requirements of Rule 23(a) and Rule 23(b) even in a settlement class. *See Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 621 (1997) ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and the court would be disarmed.").

Second, even if *Amchem* did stand for the proposition that settlements by "disarmed" counsel should not be approved, the majority assumes that class counsel should be considered "disarmed" whenever their class could not be certified for litigation in federal court. In *Amchem*, however, class counsel were "disarmed" not simply because the class could not be certified for litigation in federal court, but because the settlement "exclusively involv[ed] persons outside the MDL Panel's province-plaintiffs *without* already pending lawsuits." *Amchem Prods.,* 521 U.S. at 601 (emphasis added); *see also id.* at 601 n.3 ("It is basic to comprehension of this proceeding to notice that no transferred case is in-

cluded in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer."). Thus, if the class in *Amchem* could not bring a federal class action, it was left with nothing except mere speculation about the possibility of filing future actions. In stark contrast, in the present case there have been 12 years of litigation pending in various state courts, some of which have already decided that punitive damages may be sought. *See, e.g., Meighan v. Sprint*, 924 S.W.2d 632 (Tenn. 1996). Therefore, unlike *Amchem*, in this case, class counsel could exert enormous leverage over the defendants, since the alternative to settlement for the defendants is to spend years litigating the case in many different state court venues, which, according to appellants, might award as much as 3,000 percent more than is being offered in this settlement. *See* Buhl Br. at 23 ("[T]he plaintiffs' proof in *Hord v. Quest* is that compensatory damages will be $15-19 per foot, with punitive damages expected to multiply that figure several times."). Thus, defendants' next best alternative to settlement would *not* be the possibility of *no* litigation at all, as in *Amchem* or as the majority opinion seems to suggest in this case, but expensive and lengthy chaos in the various states that the fiber-optic cable has traversed. Far from being the classic disarmed counsel, these counsel have the fabled weapons of mass destruction.

Finally, even if the majority is correct in its first two assumptions (i.e., *Amchem* means both that (a) settlement by "disarmed" counsel should not be approved; and (b) counsel *must* be considered "disarmed" simply because their class could not be certified for litigation in federal court), the majority would still need to demonstrate that the present class action could not be certified for litigation. The majority assumes this to be so; however, it provides no analysis as to why and pays only lip service to the district court's findings. This is in stark contrast to *Amchem*, in which the Supreme Court went through a detailed analysis of why the class in

that case failed to meet the commonality requirements of Rule 23(a) and (b). *See Amchem Prods.*, 521 U.S. at 622-31.

With respect to commonality, the problems presented in *Amchem* do not apply here. In *Amchem*, cohesion was missing, because the class included members who were exposed to different asbestos-containing products, for different amounts of time, in different ways and over different periods. Some class members suffered no physical injury, some had only asymptomatic pleural changes, others had lung cancer (some of whom were smokers), others disabling asbestosis, and still others mesothelioma-a disease with a latency period of 15 to 40 years. Indeed, as to some class members, it was unclear whether they were ever exposed, and whether they would ever contract an asbestos-related disease and, if so, which one.

In the present case, there are no disparate personal injuries. Plaintiffs' and all class members' claims arise from defendant's installation and maintenance of fiber-optic cable on railroad rights of way. Any harm rising from that installation has occurred and is capable of being ascertained. All class members also raise the same legal claims. Therefore, the class has sufficient unity for settlement class certification purposes.

The majority apparently believes that such rigorous analysis is unnecessary because of this court's one-paragraph disparagement of a related class action in *Isaacs v. Sprint Corporation*. *See* 261 F.3d 679, 682 (7th Cir. 2001). However, in *Isaacs*, we merely found that the district court improperly "certified the case to proceed as a class action before making any of the determinations . . . that Rule 23 makes prerequisite to certification." *Id.* at 682 (emphasis added). Although we suggested that it was "unlikely" that common issues could be found to predominate, we did not rule out this possibility nor did we rule out the possibility that a national class action could be bifurcated or otherwise

made manageable. *Id.* In the present case, unlike *Isaacs*, the district court made the determination that the Rule 23 prerequisites were met prior to certification. Therefore, the dicta of Isaacs do not obviate the need to analyze whether the Rule 23 prerequisites are properly met in this case or require rejection of the district court's conclusions.

The majority's position has the unfortunate effect of insuring that no settlement can ever be entered in federal court in this case, because any proposed class counsel will be considered "disarmed" despite the obvious leverage counsel may wield in practice. The majority thus forfeits the manifest advantages of a national settlement for a national undertaking.

With respect to the second argument (about adjustments to the settlement by experts), the fact that the settlement agreement may require that law professors make adjustments in the settlement amount based on state law has practically no relevance to the issue whether class counsel is adequate. At worst, the adjustment procedure injects some uncertainty into the settlement agreement. If, for instance, the settling parties had the law professors derive the adjustments *ex ante* and included these adjustments in the settlement agreement (thus eliminating the uncertainty), there would be nothing for the majority to complain about. But the mere fact that the settlement agreement contains some uncertainty does not make class counsel inadequate. It cannot even be known at this point to whose benefit the uncertainty will accrue.

It is tempting to look for holes in this settlement agreement, because it appears that the intervenors may now be significantly worse off than they might have been in state court. However, because we are ill-equipped to determine the ultimate fairness of any settlement from a substantive standpoint, our job must be to insure that the process under which it was negotiated and approved was a fair one. *See Amchem Prods.*, 521 U.S. at 621 ("[T]he standards set for the protection of absent class members serve to inhibit ap-

praisals of the chancellor's foot kind-class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."). Neither the intervenors nor the majority has presented any evidence to challenge the conclusion that the agreement did not arise from a fair bargaining process. To the contrary, after significant study, the magistrate judge found no evidence of collusive negotiations in this case. Supp. App. at A-36. And, of course, the discretion of the district court is entitled to something more than lip service. Where, as here, the district court has addressed fairness in depth, we should be reluctant to disagree.

In any event, this settlement agreement is not unfair on its face. No judgment has been awarded in any state court, so although plaintiffs may find themselves in a strong position, as Yogi Berra once said, the game's not over until its over. While the land use rights in question no doubt have some theoretical value, the only real value comes from the owner's ability to sell his right to the telecommunication companies to lay such cable. Realistically, these landowners were not going to build a retirement cottage lying three feet below the railroad tracks on their property-and, if they were, it is unlikely that this settlement agreement will prevent them from doing so. The point is that it is not for this court to second-guess the value of these rights and then vacate a settlement agreement as unfair.

Hence, I believe that to cast aside a national settlement agreement fairly arrived at, and not substantively unfair on its face, is to imprudently reject the preferred treatment of this nationwide infrastructure, where it seems class counsel were anything but "disarmed" but could constantly wield the threat of a disorderly recourse to state litigation. It is crucially important that the procedures followed here be suited to the emphatically interstate and national character of this important infrastructure development. I therefore respectfully dissent.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

USCA-02-C-0072-10-19-04

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
Smith v. Sprint Communications Company L.P., et al.

Case No. 99 C 3844

Hon. Wayne R. Andersen

ORDER PRELIMINARILY APPROVING SETTLEMENT, CONDITIONALLY CERTIFYING CLASS, AND DIRECTING NOTICE

Counsel for Plaintiffs and Defendants have applied, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an order (1) certifying a settlement class; (2) preliminarily approving a proposed class settlement on the terms and conditions set forth in the Second Amended and Restated Settlement Agreement dated July 21, 2003 (the "Settlement Agreement"); and (3) approving a program for class notice. Terms capitalized herein and not defined shall have the meanings ascribed to them in the Settlement Agreement. The Court has reviewed and considered all papers filed in connection with such application, including the Settlement Agreement, and all exhibits annexed thereto, and has heard the presentations of counsel appearing with respect thereto. On the basis thereof, and on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. This Court has jurisdiction of the subject matter of this Action and jurisdiction of the Parties.

2. For settlement purposes only, this action may be maintained as a class action under Rule 23 of the Federal

Rules of Civil Procedure, on behalf of the following class (the "Class"):

> All persons or entities who or which, for any period of time during the Settlement Class Period held fee ownership in real property adjacent to a Right of Way on the Cable Side, or held any interest in real property underlying a Right of Way on the Cable Side.
>
> The Class shall not include Sprint, Qwest, Level 3 or WilTel or their past and present parents, subsidiaries, affiliates, successors, assigns, or any of their directors or officers; the United States of America; any state of the United States, any municipality or county; any foreign nation; any Native American nation or tribe; and any Right of Way Provider or any person controlled by, under the control of, or under common control with any Right of Way Provider.

3. In light of the agreement to settle the Action and the resulting elimination of individual issues that may otherwise have precluded certification of a class, the prerequisites to class certification under Fed. R. Civ. P. 23 (a) are satisfied, to-wit:

a. The Class, consisting of thousands of owners of real property, is so numerous that joinder of all members is impracticable;

b. There are questions of law and fact common to the Class, including the central question of their right to compensation for Settling Defendants' Occupation of Rights of Way with Telecommunications Facilities;

c. The claims of the Plaintiffs are typical of the claims of the Class; and

d. The Plaintiffs, represented by counsel experienced in complex litigation, will fairly and adequately protect the interests of the Class.

In light of the agreement to settle the Action and the resulting elimination of individual issues that may otherwise have precluded certification of a class, the questions of law and fact common to all members of the Class predominate over questions affecting only individual members, and certification of the Class is superior to other available methods for fair and efficient adjudication of this controversy, satisfying Fed. R. Civ. P. 23 (b)(3).

4. Wayne Smith, San Simon Gin, Inc., Gross-Wilkinson Ranch Co., Rex Dolan and Everett Chambers, named as Plaintiffs in the Complaints filed in a consolidated with this action (the "Complaints") are designated as Class representatives. Counsel appearing for these Plaintiffs are designated as Plaintiffs' Class Counsel. In accordance with the Settlement Agreement, Samuel D. Heins of Heins Mills & Olson, P.L.C. is designated and authorized to act as Plaintiffs' Settlement Counsel.

5. The terms and conditions of the proposed Settlement as set forth in the Settlement Agreement, including the provision for substantial cash payments to be trade by the Settling Defendants to Class Members who become Qualified Claimants in return for the Release of Claims and Easement and Right of Way Agreements to be delivered by Class Members, place the Settlement within the range of fair and reasonable settlements, making appropriate further consideration at a hearing held pursuant to notice to the Class.

6. A hearing (the "Settlement Hearing") shall be held approximately ninety (90) days after notice is mailed in accordance with the notice program, before the undersigned at the United States Courthouse, Courtroom 1403, 219 S. Dearborn St., Chicago, Illinois. The exact date of the Settlement Hearing will be set after the members of the Class have been identified, as described in paragraph 8 below, and will be included in the Notice and Summary Notice. The purpose of the Settlement Hearing will be to (a) determine whether the

proposed Settlement is fair, reasonable, and adequate, and should be finally approved, (b) determine whether an order and judgment should be entered dismissing this action and bringing the litigation to a conclusion, (c) consider any application of counsel for an award of attorneys' fees and expenses to counsel, and (d) consider other Settlement-related matters. The Court may adjourn, continue, and reconvene the Settlement Hearing pursuant to oral announcement without further notice to the Class, and the Court may consider and grant final approval of the Settlement, with or without minor modification and without further notice to the Class.

7. The Court appoints Rust Consulting, Inc., of Minneapolis, Minnesota, to serve as Settlement Administrator. The Court, preliminarily and subject to a more complete review of their credentials and qualifications, approves the selection of Prof. Ann M. Burkhardt, of the University of Minnesota Law School and Prof. Susan French, of the University of California Los Angeles Law School, as Real Property Law Experts for the purpose of establishing the state real property law adjustments, set forth in Sections VI.A.7.a and XI.D of the Settlement Agreement. The results of such state real property law adjustments shall be included in the Notice.

8. The Court preliminarily approves as to form the Notice of Class Action, Proposed Settlement, and Settlement Hearing (the "Notice"), and the Summary Notice, attached to the Settlement Agreement as Exhibits B and F, respectively. The Court also approves the method of directing notice to the Class, as set forth in paragraphs 9 and 10 below, and the method by which members of the Class who currently own real property adjacent to a Right of Way on the Cable Side will be identified, as set forth in the parties' Memoranda in Support of the Joint Motion for Preliminary Approval of Settlement, Certification of a Settlement Class, Approval of Notice and Entry of an Injunction Against Prosecution of Settled Claims.

9. Within thirty (30) days after the Settlement Administrator's receipt of all available information identifying members of the Class who currently own real property adjacent to a Right of Way on the Cable Side, the Settlement Administrator shall prepare and cause individual copies of the Notice to be sent by United States mail, first class postage prepaid, to each such identified member of the Class. The Settlement Administrator also shall mail copies of the Notice to any other potential members of the Class that request copies or that otherwise come to its attention.

10. As soon as publication schedules practically permit, but no sooner than five (5) days after the initial mailing of the Notice, the Settlement Administrator shall cause the Summary Notice, the content of which shall be substantially as set forth in Exhibit F to the Settlement Agreement, to be published in accordance with the Summary Notice program, a; set forth in the parties' Memoranda in Support of the Joint Motion for Preliminary Approval of Settlement, Certification of a Settlement Class, Approval of Notice and Entry of an Injunction Against Prosecution of Settled Claims.

11. The Court finds that the foregoing plan for notice to the Class will provide the best notice practicable under the circumstances, and is in compliance with the requirements of Rule 23 of the Federal Rules of Civil Procedure and applicable standards of due process.

12. Prior to the Settlement Hearing, (a) the Settling Defendants shall file with the Court an affidavit or declaration from a representative of Settling Defendants, or from an appropriate representative of the fine or firms engaged to assist in the process of identifying members of the Class, as described in paragraph 8 above, of the steps taken to identify members of the Class, and (b) Plaintiffs' Settlement Counsel shall file with the Court an affidavit from a representative of the Settlement Administrator confirming that the plan for disseminating the Notice and the Summary Notice has been

accomplished in accordance with the provisions of paragraphs 8, 9 and 10 above.

13. Members of the Class who wish to exclude themselves from the Class must request exclusion in accordance with the instructions set forth in the Notice. Members of the Class who do not submit timely and valid requests for exclusion will be bound by the terns of the Settlement, in the event it is approved by the Court and becomes effective, and any orders and judgments subsequently entered in the Action, whether favorable or unfavorable, regardless of whether they submit Claims for Landowner Benefits to the Settlement Administrator. Members of the Class who submit timely and valid requests for exclusion will not be bound by the terms of the Settlement or any orders or judgments subsequently entered in the Action, and they may not submit Claims for Landowner Benefits to the Settlement Administrator.

14. This Court finds that it has the authority, pursuant to Fed.R.Civ.P. 70 and as provided in the Settlement Agreement, to (a) direct all members of the Class who own a current interest in a Qualifying Parcel and have not requested exclusion from the Class, regardless of whether they file a Claim for Landowner Benefits, to grant an Easement and Right of Way Agreement to the Settling Defendants, as provided in tne Settlement Agreement, and (b) direct the Settlement Administrator to execute an Easement and Right of Way Agreement on behalf of all members of the Class who own a current interest in a Qualifying Parcel and who did not exclude themselves from the Class, but did not themselves execute an Easement and Right of Way Agreement. Members of the Class shall be advised in the Notice and Summary Notice of the Court's authority to convey an easement in their property, unless they exclude themselves from the Class. The Class Notice shall also advise Class Members that Plaintiffs will be entitled and required, in certain circumstances, to institute ancillary proceedings in other states, on behalf of the Class, for the purpose of obtaining judg-

ments quieting or otherwise confirming Settling Defendants' rights in the real property granted by the Easement and Right of Way Agreement.

15. Members of the Class who do not request exclusion may submit by a date to be established after Class members have been identified written comments on or objections to the Settlement, the application for an award of fees and expenses, or other Settlement-related matter. Any member of the Class who has not requested exclusion may also attend the Settlement Hearing, in person or through counsel, and if the Class Member has submitted written objections, may pursue those objections. However, no Class Member shall be entitled to contest the foregoing matter in writing and/or at the Hearing unless the Class Member has served and filed by first-class mail, postage prepaid and postmarked no later than forty-five (45) days before the date of the Settlement Hearing, copies of the statement of objection, together with any supporting brief and all other papers the Class Member wishes the Court to consider (which must include the name and number of this case: Smith v. Sprint, et al., Case No. 99 C 3844, and a notice of appearance from any counsel for the Class Member who intends to appear at the Hearing. Such notices and papers must be filed with the Court at the following address:

Office of the Clerk
United States District Court
Northern District of Illinois
Everett McKinley Dirksen Building
219 South Dearborn Street
Chicago, Illinois 60604;

and served on Plaintiffs' Settlement Counsel who shall provide the same to other counsel of record:

Samuel D. Heins
Heins Mills & Olson, P.L.C.
3550 IDS Center

80 South Eighth St.
Minneapolis, MN 55402:

and on the following representative of the Settling Defendants:

J. Emmett Logan
Stinson Morrison Hecker L.L.P.
2600 Grand Avenue
Kansas City, Missouri 64108

Each statement of objection must identify (1) the name and address of the Class Member, and (2) the name and address of the Class Member's counsel, if any, and, (3) in order to confirm Class membership, the legal description of the Class Member's Qualifying Parcel. Unless otherwise directed by the Court, any Class Member who does not submit a statement of objection in the manner specified above will be deemed to have waived any such objection.

16. All papers in support of the proposed Settlement and Plaintiffs' Class Counsels' application for an award of attorneys' fees and expenses shall be filed at least thirty (30) days prior to the Settlement Hearing.

17. During the Court's consideration of the Settlement and pending further order of the Court, all proceedings in this Action, other than proceedings necessary to carry out the terms and provisions of the Settlement Agreement, and to effectuate the procedures regarding the determination of attorneys fees, are hereby stayed and suspended.

18. If the proposed Settlement is not approved by the Court or for any reason does not become effective, the Settlement Agreement will be regarded as nullified, certification of the Class for settlement purposes will be vacated, and the steps and actions taken in connection with the proposed Settlement (including this Order (except as to this paragraph) and any judgment entered herein) shall become void and have no further force or effect. In such event, the parties and

their counsel shall take such steps as may be appropriate to restore the pre-settlement status of the litigation.

19. Neither the Settlement Agreement nor the provisions contained therein, nor any negotiations, statements, or proceedings in connection therewith shall be construed, or deemed to be evidence of, an admission or concession on the part of any of the Plaintiffs, the Settling Defendants, any member of the Class, or any other person of any liability or wrongdoing by all of them, or of any lack of merit in their claims or defenses, and shall not be offered or received in evidence in any action or proceeding.

20. The court retains jurisdiction of this action and of all matters relating to the Settlement.

Dated: July 25, 2003

The Honorable Wayne R. Andersen
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

WAYNE P. SMITH, on his behalf and all others similarly situated,	)
Plaintiffs,	) **Case No. 99 C 3844**
v.	)**Honorable Wayne Anderson**
	)**Magistrate Judge Geraldine Soat Brown**
SPRINT CORPORATION, et al.,	)
Defendants.	)

MEMORANDUM OPINION REGARDING INTERVENORS' MOTION FOR DISCOVERY OF SETTLEMENT NEGOTIATIONS.

Magistrate Judge Geraldine Soat Brown

The District Judge has referred discovery motions to this Court for ruling. [Dkt# 147.] Intervenors George and Ruth Schillinger by their counsel have filed a Motion for Discovery of Settlement Negotiations [dkt# 149] seeking discovery of the negotiations that led to the Settlement Agreement dated as of September 4, 2002 (the "Settlement Agreement") [dkt# 140] between a proposed class of plaintiffs on one hand and Sprint Corporation, Sprint Communications Company L.P., Qwest Communications Corporation and others (the "Settling Defendants") on the other hand. Intervenors seek discovery of the face to face negotiation meetings, drafts of the Settlement Agreement, and depositions of the

key settlement negotiators. (Mem. Supp. Mot. at 2.) The Settling Defendants and the counsel for the plaintiffs advocating approval of the Settlement Agreement (hereinafter referred to as the "Plaintiffs' Counsel") oppose such discovery. For the reasons set out herein, that motion has been granted in part and denied in part. [Dkt# 222.]

In reviewing the proposed settlement of a class action, the District Judge must determine whether the settlement is fair, adequate and reasonable, and not a product of collusion. *Reynolds v. Beneficial Nat'l. Bank,* 288 F.3d 277, 279 (7th Cir. 2002). The District Judge must keep in mind a number of considerations, including: protecting the class from lawyers for the class who may, in derogation of their duty to the class, place their pecuniary self-interest ahead of the interests of the class (288 F. 3d at 282); being alert to the possibility of a "reverse auction" in which the defendant in a series of class actions deliberately negotiates with the most ineffectual class lawyers (*Id.*); and avoiding turning the fairness hearing into a trial of the merits of the claims. (*Id.* at 285). The Intervenors argue that those considerations require discovery of the settlement negotiations leading to the Settlement Agreement.

In certain cases courts have permitted the parties objecting to a proposed settlement to take discovery of the circumstances leading up-to the agreement. For example, in *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979), the Seventh Circuit reversed a decision to approve a class settlement where it appeared that the Illinois Attorney General had violated a court order by participating in settlement negotiations with the defendant without the consent of other plaintiffs' counsel. The court held that those facts justified discovery by the objectors to determine whether those negotiations might have prejudiced the class. *Id.* at 1126. However, discovery of settlement negotiations is the exception, not the norm.

> Discovery of settlement negotiations in ongoing litigation is unusual because it would give a party information about an opponent's strategy . . . . Such discovery is proper only where the party seeking it lays a foundation by adducing *from other sources* evidence indicating that the settlement tray be collusive, as in the *General Motors* case where negotiations with one class counsel were carried out in violation of the district court's order.

Mars Steel Corp. v. Continental Illinois Nat'l. Bank, 834 F.2d 677, 684 (7th Cit. 1987)(emphasis added). In Mars, the Seventh Circuit affirmed the district court's approval of the settlement, concluding that the District Judge did not abuse his discretion in refusing to permit the objectors to take discovery about the settlement negotiations. *Id.* The Seventh Circuit observed that there was no indication of "hanky-panky" in the settlement in *Mars,* which was highly favorable to tire class. *Id.*

The policy reasons for requiring a threshold showing before compelling discovery of settlement negotiations are apparent. In general, the law favors settlement, and recognizes in Federal Rule of Evidence 408 that the confidentiality of settlement negotiations furthers this goal, while also recognizing that there are exceptions to that confidentiality. Likewise, if discovery including the depositions of the negotiators were routinely ordered when an objection is made to a class action settlement, the potential to chill settlement negotiations is obvious. The risk to a party of exposing strata or weakness or revealing attorney-client privileged communications would be multiplied. See discussion of this point in *Mars,* 834 F.2d at 684. In addition, the costs and time of litigation, which the parties hope to bring to an end by settlement, would be increased by the discovery process and additional depositions.

The Seventh Circuit observed in Mars, that the court does not "prescribe the modalities of negotiation" and "[t]he proof of the pudding [is] indeed in the eating." *Id.* at 684. The District Judge's objective is to determine if a proposed settlement agreement is fair to the class. Discovery of settlement negotiations is only worth the effort and the risk if it contributes in a meaningful way to that determination. On the other hand, the *Engine Interchange* case instructs that District Judge cannot trust that the fairness hearing alone will safeguard the interests of the class where there is evidence of improper conduct potentially harmful to the interest of the class. Ultimately, the decision about such discovery is left to the discretion of the District Judge.

In this case, a substantial part of the Intervenors' argument for discovery is that the proposed settlement is the product of collusion because it provides inadequate compensation to the class members and is unfair and burdensome to the class. (Mem. Supp. Mot. at 9-15.) The Plaintiffs' Counsel and the Settling Defendants argue otherwise, and state that the settlements to which the Intervenors compare the Settlement Agreement have significantly different facts. (Mem. Opp'n. Mot. at 16-27; Defs.' Mem. Opp'n. Mot. at 11-15.) However, a disagreement about the merits of the Settlement Agreement cannot be the basis for a ruling permitting discovery of settlement, negotiations, or discovery would be available in virtually every proposed class settlement to which there is an objection. Obviously, most objections are based on an argument that the proposed settlement is inadequate or unfair to the class. Accordingly, the Seventh Circuit requires evidence "from other sources" that the settlement may be collusive. *Mars*, 834 F.2d at 684.

Unlike the Mars case, there is no allegation here that the settlement negotiations were conducted in violation of a court order. However, the Intervenors identify other grounds that they assert give rise to a suspicion of collusion or reverse auction, and thus justify discovery.

They argue that the Settling Defendants engaged in lawyer shopping, singling out ineffectual Plaintiffs' counsel to negotiate with. (Mem. Supp. Mot. at 6.) Not surprisingly, the Plaintiffs' Counsel vigorously dispute the suggestion that they are ineffectual, and state that at the time settlement negotiations began in the fall of 2000, the law firms that collectively comprise Plaintiffs' Counsel had filed 15 lawsuits on the issue of fiber optic cable right of way against the Settling Defendants and MCI.[1] They also state that they pursued those cases aggressively, taking voluminous discovery and briefing contested motions, before the settlement talks began. The Plaintiffs' Counsel state that they collectively have invested millions of dollars in expenses and *thousands of* hours of legal work in litigating the cases. (Men. Opp'n. Mot. at 12-14.)

While the lawyers dispute which group is the more effective advocate, it is clear that the situation here is not remotely like that of the *Reynolds* case, where a defendant chose to conduct settlement negotiations with two lawyers who at the time negotiations began did not even have a single pending lawsuit against either of the defendants. 288 F.3d at 280. In this case, while the Intervenors' counsel argue that they are a greater threat to the Settling Defendants, it is apparent that the Plaintiffs' Counsel have also been engaged in genuine litigation efforts against the Settling Defendants. There does not appear to this Court to be any basis for concluding that the Settling Defendants chose to negotiate with the Plaintiffs' Counsel because the Settling Defendants believed that the Plaintiffs' Counsel could not or would not effectively represent the class.

The intervenors also argue that the exclusion of their counsel from the settlement negotiations is evidence of col-

---

[1] MCI WorldCom was originally part of the settlement negotiations but is not part of the Settlement Agreement due to its filing for bankruptcy protection.

lusion. The Intervenors state that, in March 2001, during discussions regarding discovery issues in one of the cases filed by Intervenors' counsel, one of Qwest's attorneys, John Daum, remarked that he would rather discuss settlement with a "greedy plaintiffs' lawyer" than an ideologue like Nels Ackerson, one of Intervenors' counsel. (Mem. Supp. Mot. at 8.) Mr. Daum responds with an affidavit in which he states that in March, 2001, Qwest was involved in settlement negotiations with the lawyers from the law firm Heins, Mills & Olson (now part of the Plaintiffs' Counsel), who had five lawsuits then pending against Qwest. (Daum Dec. ¶ 2, attached to Defs.' Mem. Opp'n. Mot.) Mr. Daum states that he discussed possible settlement with John Massopust (now one of Intervenors' counsel) who was representing the plaintiffs in a fiber optic cable lawsuit against Qwest in Texas. (*Id.*) As of that time, Mr. Daum had never met or spoken with Mr. Ackerson, but had heard from counsel for AT&T, which conducted extensive negotiations with Mr. Ackerson, that Mr. Ackerson was unreasonable, arrogant, full of himself, untrustworthy and difficult to deal with. (*Id.* ¶ 4.) Mr. Daum states that he made the "greedy plaintiffs' lawyer" remark in a jocular sense, because Mr. Massopust was attempting to persuade him (Mr. Daum) that Mr. Massopust was a reasonable person to negotiate with. (*Id.* ¶ 5.) Thereafter, Qwest had "two and possibly three meetings" with Mr. Massopust to discuss settlement, which were not successful, but were cordial and businesslike. (*Id.* 1 6.)

Plaintiffs' Counsel submit the affidavit of Samuel Heins, a shareholder of the law firm Heins, Mills & Olson, and one of the present Plaintiffs' Counsel. (Attachment to Mem. Opp'n. Mot.) Mr. Heins states that in the fall of 2000, the present Plaintiffs' Counsel were approached by the Settling Defendants' counsel (and MCI's counsel) to discuss settlement. (*Id.* ¶ 2.) He demanded and received an agreement from Settling Defendants' counsel that the negotiations would not be a negative auction, that Settling Defendants

would not negotiate with any other group of plaintiffs' counsel while the negotiations were ongoing, and that Plaintiffs' Counsel would not be asked by Settling Defendants to negotiate with reference to any position taken by any other plaintiffs' counsel. (*Id.* ¶ 5.) He further states that Settling Defendants abided by that agreement, and never attempted to drive down the class settlement by holding out the possibility of negotiating with other plaintiffs' counsel. (*Id.* ¶¶ 6, 10.) Mr. Heins is aware that Qwest met one time with attorneys from the Ackerson Group after that law firm made a motion to be included in settlement negotiations in *Hudson v. Qwest,* where the Ackerson Group represents certain intervenors, but was informed that no specific compensation was discussed. (*Id.* ¶ 7.)

In reply, the Intervenors attach the Affidavit of Mr. Massopust. (App. Ex. Intervenors' Consol. Reply, Ex. 1.) Mr. Massopust states that in early 2001, he called Mr. Daum to discuss settlement, but got no response. (*Id.* ¶ 2.) Mr. Massopust states that Mr. Daum made his "greedy plaintiffs' lawyer" comment to Dan Millea, Mr. Massopust's partner during a meet-and-confer discussion about discovery issues in litigation against Qwest. (*Id.* ¶ 3.) Mr. Massopust again contacted Mr. Daum in May or June 2001 and suggested discussing settlement. He and his co-counsel Henry Price met with Mr. Daum on July 3, 2001, and provided a two-page document of guiding principles for a settlement with Qwest. (*Id.* ¶ 4.) Mr. Massopust states that Mr. Daum reviewed the document and indicated that he found it generally acceptable. (*Id.* ¶ 5.) Mr. Massopust was aware that Mr. Daum was also negotiating with Samuel Heins of the Heins, Mills & Olson firm, but was not informed that there was an agreement that those talks would be exclusive. (*Id.* ¶ 6.) Mr. Massopust states that he met again with Mr. Daum on August 16, 2001, and Qwest made a specific settlement offer, which Mr. Massopust memorialized in a letter along with his counterdemand to the offer. (*Id.* 1 ¶ 7.) That letter is attached as Ex-

hibit B to his affidavit. He states that he never received a response from Qwest and about a month later learned that Qwest and the other Settling Defendants had reached agreement with the Plaintiffs' Counsel at $.60 per square foot. (*Id.*)

Mr. Massopust states that he also approached defendant Sprint about settlement, writing to Sprint's counsel on May 17, 2001. (*Id.* ¶ 10.) He received a short response stating that "Sprint is interested in exploring any reasonable method for resolving this litigation" and asking for "specific information" about how Mr. Massopust believes settlement could be achieved. (*Id.*, Ex. D.) On June 25, 2001, Mr. Massopust wrote to Sprint's counsel outlining a settlement proposal. (*Id.* ¶ 11.) Mr. Logan responded on July 16, 2001, saying that it was not interested in certain aspects of Mr. Massopust's proposal, including the creation of a "Class Corridor LLC" and saw no reason to believe that a meeting would be fruitful. (*Id.*, Ex. F.) Mr. Massopust wrote back to Sprint's counsel on July 27, 2001, but never received a response. (*Id.* ¶ 11.)

Intervenors Hallaba and Chem-Tronics argue that there is a *possibility* that their settlement negotiations with WorldCom in November 2000, which were then confidential, were leaked to the Plaintiffs' Counsel, which would then be in a position to undercut Hallaba. (M.A.S. Hallaba and Chem-Tronic, Inc.'s Reply Supp. Mot. at 2.) According to Mr. Heins, Hallaba's counsel as well as the judge presiding in that case, were told by letter in December 2000 that MCI was discussing settlement with "other plaintiffs' counsel." (Hems' Dec. 5.) Hallaba contends that in December 2000, a settlement was reached with MCI Worldcom. (M.A.S. Hallaba and Chem-Tronic, Inc.'s Reply Supp. Mot. at 2.) Hallaba's motion to enforce that alleged settlement was denied on September 5, 2001. *Hallaba v. WorldCom Network Ser-*

vices. Inc. 98-cv-895 (N. D. Okla.).[2] The timing of the possible leak is so remote from the conclusion of the settlement negotiations leading up to the Settlement Agreement at issue here that this suspicion cannot constitute the evidence necessary to justify undertaking discovery.

Intervenors argue that the submission of affidavits by Messrs. Heins and Daum requires that the Court permit depositions of the affiants. However, that argument goes too far, because it would then surrender the Court's control over the conduct of discovery to the parties. Especially in an area where, as discussed above, discovery is not the norm but the exception, the Court must determine what discovery, if any is appropriate.[3] *Computer Network Corp. v. Spohler,* 95 F.R.D. 500 (D.C. D.C. 1982), cited by Hallaba (M.A.S. Hallaba and Chem-Tronic, Inc.'s Reply Supp. Mot. at 3-4), is not to the contrary. In that case a lawyer had submitted an affidavit on the merits of the litigation in connection with a motion for expedited discovery. Apparently there was no dispute that the lawyer's deposition should proceed; the issue was whether the factual basis for the statements made in the affidavit could be shielded by attorney-client privilege, and the court concluded that they could not. *Computer Network Corp.,* 95 F.R.D. at 502-03.

Having reviewed carefully the affidavits and exhibits; this Court concludes that they do not support an inference of collusion. The Intervenors were not precluded from making a proposal to the Settling Defendants. They made proposals to two defendants, but neither was interested in the settlement the Intervenors proposed. Likewise, there is no evi-

---

[2] An appeal of that decision is pending in the Tenth Circuit Court of Appeals, but stayed because of the MCI WorldCom bankruptcy filing.

[3] In contrast, the case cited by Hallaba, *Russell v. Acme-Evans Co.,* 51 F.3d 64, 70 (7th Cir. 1995), involves an affidavit submitted by the defendant in support of a motion for summary judgment. The deposition of such fact witnesses is, of course, customary.

dence that the Settling Defendants solicited demands from different plaintiffs' groups in an effort to play them off against each other. On the contrary, the Intervenors' counsel was the one who approached the Settling Defendants and made specific proposals that were rejected.

Based on the foregoing, the only possible question is whether the two settlement proposals made by the Intervenors' counsel in the spring and summer of 2001 had a negative impact on the settlement then being negotiated by Plaintiffs' Counsel, that is, whether the Settling Defendants used the proposals to extract better terms from the Plaintiffs' Counsel. If there were a "reverse auction" in which the Settling Defendants played the Intervenors' counsel's proposals against the proposals advanced by the Plaintiffs' counsel, it would presumably be reflected in a change (to the detriment of the class) in the settlement proposals being negotiated with Plaintiffs' counsel, coinciding with the overtures made by the Intervenors' group. The evidence of reverse auction should manifest itself in the paper trail of the negotiations.

In this case we have the services of James D. Wilson, the special master appointed by the District Judge pursuant to the agreement of the parties, whose scope includes assisting in the assessing the fairness of the Settlement Agreement. (Order Appointing James D. Wilson.) [Dkt# 180.] Producing the documents reflecting the course of the settlement negotiations to Mr. Wilson serves the purpose of detecting whether there is evidence of a reverse auction while avoiding the disruption and risks inherent in producing settlement drafts to other parties that are opposing the settlement, and who would, if the settlement was not approved, be continuing in litigation against the Settling Defendants.

For the foregoing reasons, this Court orders as follows:

1. On or before November 26, 2002, "Plaintiffs' Class Counsel" and "Settling Defendants," as those terms are defined in the Settlement Agreement dated as of September 4,

2002, shall deliver to special master James D. Wilson one copy of:

(a) all written settlement proposals;

(b) all drafts of the Settlement Agreement, including exhibits thereto; and

(c) all cover letters to those documents;

that were exchanged between the Plaintiffs' Class Counsel or anyone on their behalf on the one hand, and the Settling Defendants or anyone on their behalf on the other hand, between April 1, 2001 and September 4, 2001. (These documents are hereinafter referred to as the "Settlement Draft Documents.") The producing party may redact from the copy any notes that were not included on the Settlement Draft Documents as transmitted to the opposing side. This is not a waiver by any party of any objection to the admissibility of any document or evidence pursuant to Federal Rule of Evidence 408.

2. Mr. Wilson shall maintain the Settlement Draft Documents in confidence and access to them shall be limited to the Wilson Group as provided in the Order Appointing James D. Wilson. Mr. Wilson shall review the Settlement Draft Documents to determine whether they evidence a "reverse auction" as that term is used in *Reynolds v. Beneficial Nat'l. Bank*, 288 Fad 277, 282 (7th Cir. 2002). He shall report to the Court concerning his findings in this respect.

3. In all other respects, Intervenors' Motion is denied.

IT IS SO ORDERED.

GERALDINE SOAT BROWN
UNITED STATES MAGISTRATE JUDGE

NOVEMBER 19, 2000

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60804

December 13, 2004

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

Nos. 03-3087, 03-3140, 03-3659 & 03-3660

WAYNE SMITH, LESCO ENTERPRISES, INC., SAN SIMON GIN, INC., GROSS-WILKINSON RANCH CO., REX DOLAN, EVERETT CHAMBERS, and JOANNE CHAMBERS, on their behalf and all others similarly situation,

Plaintiffs-Appellees,

v.

SPRINT COMMUNICATIONS COMPANY, L.P., QWEST COMMUNICATIONS

Appeals from the United States District Court for the Northern District of Illinois Eastern Division.

No. 99 C 3844

Wayne R. Anderson, *Judge*

CORPORATION, LEVEL 3
COMMUNICATIONS, LLC,
WILTEL COMMUNICATIONS,
LLC, and UNION PACIFIC |
RAILROAD COMPANY,
Defendants-Appellees.

APPEALS OF:
CHEM-TRONICS, TNC.
DANIEL R. BUHL,
JOE C. MEIGHAN, JR.,
CHARLES W. HORD, and
JOY PRATT HORD,
Intervenors.

ORDER

Petitions for rehearing and rehearing en banc were filed in this ease on November 2, 2000. The panel vote l 2-1 (Judge Cudahy dissenting) to deny rehearing. The petitions for rehearing are, accordingly, DENIED. No judge has requested a vote on the petitions for rehearing en banc.[1] Accordingly, they are DENIED.

SO ORDERED

[1] Chief Circuit Judge Flaum and Circuit Judge Rovner did not participate in the consideration of this case.

Appendix D

FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact com-

mon to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

• the nature of the action,

• the definition of the class certified,

• the class claims, issues, or defenses,

• that a class member may enter an appearance through counsel if the member so desires,

• that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be

given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request ex-

clusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a

reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

VINCENT E. BUCHENAU, *et al,*	
Plaintiffs	Case No. 99 CV 3844
v.	Honorable Wayne R. Andersen
SPRINT CORPORATION, *et al.,*	Magistrate Judge Brown
Defendants	

REPORT OF SPECIAL MASTER

Now comes James D. Wilson, acting as Special Master, pursuant to order of Appointment entered by this Court on October 16, 2002 and the Court's direction in its Orders of November 19, 2002 [dkt# 228] and November 21, 2002 [dkt# 242], and reports as follows:

On or about November 19, 2002, in response to Intervenors George and Ruth Schillinger's Motion for Discovery of Settlement Negotiations, the Court ordered the *in camera* production of "(a) all written settlement proposals; (b) all drafts of the Settlement Agreement, including exhibits thereto; and (3) all cover letters to those documents." [dkt# 228] As amended, the Order required the production of all documents exchanged by "Plaintiffs Class Counsel" and the "Settling Defendants" between April 1, 2001 and October 8, 2001. [dkt# 228, 242] The Court further ordered that the Special Master review such materials and report his findings

as to whether the documents inspected provided evidence of a reverse suction as that term is used in *Reynolds v. Beneficial National Bank,* 288 F.3d 277 (7th Cir. 2002).

Pursuant to the Court's Order of November 19, 2002, on November 26, 2002, the following documents were produced for inspection:

DATE	FORMAT	SENDER	RECIPIENT	ATTACHMENT
04/18/01	E-mail	Daum	Heins	Heads of Agreement
06/12/01	Letter	Logan	Heins and Defense Counsel	Settlement Agreement
07/02/01	E-mail	Logan	Heins and Defense Counsel	Easement Exhibit
07/03/01	E-mail	Logan	Heins and Defense Counsel	Settlement Agreement
07/12/01	E-mail	Logan	Steiner and Defense Counsel	Settlement Agreement
07/27/01	E-mail	Steiner	Defense Counsel	Settlement
				Agreement and Exhibits
08/27/01	Fax	Heins	Defense Counsel	Letter about Expenses
08/30/01	E-mail	Logan	Steiner and Defense Counsel	Settlement Agreement
08/30/01	E-mail	Steiner	Loan	None
09/05/01	E-mail	Steiner	Loan	None
09/06/01	Fax	Steiner	Defense Counsel	Settlement Timeline
09/07/01	E-mail	Steiner	Loan	Exhibits
09/12/01	E-mail	Steiner	Logan and Defense Counsel	Settlement Agreement
09/14/01	E-mail	Steiner	Logan and	Preliminary

			Defense Counsel	Approval Order
09/25/01	E-mail	Jones	Steiner and Defense Counsel	Settlement Agreement
09/27/01	E-mail	Steiner	Jones	Final Order
10/01/01	Letter	Heins	Daum	Ancillary Proceedings Language
10/02/01	E-mail	Jones	Steiner and Defense Counsel	Settlement Agreement
10/02/01	E-mail	Steiner	Logan	Ancillary Proceedings Language
10/03/O1	E-mail	Steiner	Defense Counsel	None
10/05/01	E-mail	Zaccardi	Defense Counsel	Provision on Ancillary Judgments
10/05/01	E-mail	Steiner	Defense Counsel	Class Notice
10/05/01	E-mail	Jones	Steiner and Defense Counsel	Settlement Agreement

I have reviewed each of the listed documents and the accompanying attachments and find that for the reasons stated below they do not provide evidence that a reverse auction was conducted in this matter.

REVERSE AUCTION

An auction is defined as "a public sale of property to the highest bidder by one licensed and authorized to do so and the goal of which is to obtain the best financial return for the seller by free and fair competition among bidders. 7 Am. Jur. 2d, *Auctions and Auctioneers,* § 1 (2002). Competitive bidding is an essential element of an auction sale. *Id.* The United States Court of Appeals for the Seventh Circuit has defined a reverse auction as the practice whereby the defen-

dant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant. *Reynolds v. Beneficial National Bank,* 288 F.3d 277, 282 (7th Cir. 2002).

Here, the objectors argue that the proposed settlement was the result of a reverse auction. If true, one would expect to see evidence that the defendants attempted to buy the best release for the lowest price by establishing competition among bidding plaintiffs' counsel. Ultimately, this would lead to a settlement with the weakest lawyer at the lowest price. Evidence of a reverse auction might include negotiations which result in the cost of settlement to the defendants decreasing in actual monetary terms, or the other terms becoming more favorable to the defendants as the settlement is shopped amongst competing plaintiffs' counsel. Similarly, because the "reverse auction" the Seventh Circuit described in the *Beneficial National Bank* case is not conducted as a traditional suction with a series of closely spaced sequential bids, one might expect to observe some delay between bids and offers while the settlement is shopped to other counsel. Finally, one might expect to see reference to the competing bidder or bidders in the communications as the defendants attempt to maximize their leverage as the "auctioneer."

Here the documents provided present no evidence of a reverse auction. The documents reveal that the per foot price went up during the relevant time period, increasing total settlement costs to the defendants. Although not all, many of the settlement terms improved for the proposed plaintiff class *vis a vis* both the defendants and the plaintiffs' counsel as the drafts progressed. There is no indication in the documents submitted that a third party bidder was involved, much less being used to reduce the consideration. Other than the two month delay between the "Heads of Agreement" and the first draft Settlement Agreement, there appears to be no significant delay in the negotiations which would have allowed

the settlement to be shopped or bid upon by other potential counsel.

The documents evidence significant disagreement, re-writing and compromise in the language of the Settlement Agreement. There appear to have been disputes over changes in language which are typical when there is vigorous advocacy by both defendants' counsel and proposed plaintiffs' class counsel. Nothing within the documents provided is "evidence" of a reverse auction.

For the foregoing reasons, I find that there is no evidence in the documents submitted pursuant to the Court's November 19, 2002 Order of a reverse auction being conducted in this matter.

_____
James D. Wilson
Special Master

James D. Wilson
SHEFSKY & FROELICH LTD.
25th Floor
444 N. Michigan
Chicago, IL 60611
(312) 527-4000
No. 29143

CERTIFICATE OF SERVICE

The undersigned, pursuant to the penalties for perjury, states and affirms that she forwarded a true and correct copy of the foregoing *Report of Special Master* via e-mail to the names listed on the Service List this 3rd day of January, 2003

_____